Supreme Court, U.S.
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No. 92-702

In the
Supreme Court of the United States
October Term, 1992

STATE OF MISSOURI,

Petitioner,

v.

VORNELL PARKER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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24 pp

RESPONDENT'S COUNTER-STATEMENT TO QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THIS COURT LACKS CERTIORARI JURISDICTION BECAUSE THE MISSOURI SUPREME COURT DID NOT ENTER A FINAL JUDGMENT ON ALL THE ISSUES PRESENTED WHEN IT REFRAINED FROM RENDERING ANY DECISION ON THE REMAINING NON-BATSON CLAIMS PRESENTED AND BY ORDERING A REMAND ON THE BATSON CLAIM AND WHETHER GRANTING CERTIORARI WOULD VIOLATE THE YOUNGER v. HARRIS ABSTENTION DOCTRINE.

II.

WHETHER CERTIORARI SHOULD BE DENIED BECAUSE REQUIRING PETITIONER TO ALWAYS SUPPLY REASONS MERELY IMPLEMENTS BATSON, A MATTER COMMITTED TO THE LABORATORY OF THE STATES, AND THEREBY ADVANCES THIS COURT'S PURPOSE OF ERADICATING RACIAL DISCRIMINATION IN THE COURTROOM.

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IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The opinion of the Missouri Court of Appeals transferring the case to the Missouri Supreme Court and the opinion of the Missouri Supreme Court are included as Appendices to the Petition for Certiorari and will be referenced as needed as Pet. A.

STATEMENT OF LACK OF JURISDICTION

Presented to the Missouri Supreme Court for its consideration were three separately denominated Points Relied On. The Missouri Supreme Court decided only one of those claims, ordering the case remanded for a Batson hearing, while retaining jurisdiction over all the claims presented. Because there is not a final judgment from the Missouri Supreme Court disposing of all claims presented to that Court, this Court, as discussed in greater detail infra, lacks jurisdiction to grant certiorari under 28 U.S.C. Section 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 28 U.S.C. Section 1257(a) provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. **Missouri Constitution Article V, Section 10 (amended 1976)** provides:

> Cases pending in the court of appeals shall be transferred to the supreme court when any participating judge dissents from the majority opinion and certifies that he deems said opinion to be contrary to any previous decision of the supreme court or of the court of appeals, or any district of the court of appeals. Cases pending in the court of appeals may be transferred to the supreme court by order of the majority of the judges of the participating district of the court of appeals, after opinion, or by order of the supreme court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule. The supreme court may finally determine all causes coming to it from the court of appeals, whether by certification, transfer or certiorari, the same as on original appeal.

STATEMENT OF THE CASE

Mr. Parker was convicted of possession of cocaine (Pet. A 2). At trial ten black venirepersons were eligible to serve as jurors and petitioner exercised five of its seven peremptory challenges against those who were eligible (Pet. A 12). Defense counsel objected on the grounds the challenges violated Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (Pet. A 12). The trial judge initially commented that he did not believe a Batson hearing was necessary because of the number of eligible black venirepersons who remained after petitioner's peremptory challenges (Pet. A 12). When the trial court solicited the prosecutor to state his reasons for the challenges he indicated he would not, unless ordered to do so (Pet. A 12-13).

In the Missouri Court of Appeals, Eastern District, Mr. Parker presented three Points Relied On or claims of error. The first Point presented was the Batson challenge (Resp. A 8, 13-18). The second claim related to the prosecutor's closing argument and alleged violations of Mr. Parker's rights to due process and effective assistance of counsel under the State and Federal Constitutions (Resp. A 9-10, 19-23). A final, third, claim pertained to statements made by a venireperson during voir dire and, again, contended Mr. Parker's rights to due process and effective assistance of counsel under the State and Federal Constitutions were violated (Resp. A 11-12, 24-29). The Eastern District addressed all of the claims raised and ordered the case transferred to the Missouri Supreme Court to address the question

of what constitutes a prima facie case when a Batson challenge is raised (Pet. A 28-32).

The Missouri Supreme Court reviewing the cause as though on original appeal, under Mo. Const., Art. V, Sec. 10 (amended 1976), remanded the first claim for a Batson hearing with the directive to the trial court to "certify to this Court a record of its proceeding" (Pet. A 20). The same two additional claims presented to the Missouri Court of Appeals were also presented to the Missouri Supreme Court, but left undecided until the trial court certifies to the Supreme Court the record from the Batson hearing (Pet. A 1-27; Resp. A 63-66, 90-102).

ARGUMENT

I.

WHETHER THIS COURT LACKS CERTIORARI JURISDICTION BECAUSE THE MISSOURI SUPREME COURT DID NOT ENTER A FINAL JUDGMENT ON ALL THE ISSUES PRESENTED WHEN IT REFRAINED FROM RENDERING ANY DECISION ON THE REMAINING NON-BATSON CLAIMS PRESENTED AND BY ORDERING A REMAND ON THE BATSON CLAIM AND WHETHER GRANTING CERTIORARI WOULD VIOLATE THE YOUNGER v. HARRIS ABSTENTION DOCTRINE.

Under the terms of 28 U.S.C. Section 1257(a), this Court only has jurisdiction of final judgments rendered by the highest court of a State. See, e.g., New York Times Co. v. Jascalevich, 439 U.S. 1317, 1318 (1978). In order for a state appellate court judgment to be final for certiorari jurisdiction to exist "it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed.'" Gospel Army v. Los Angeles, 331 U.S. 543, 546 (1947) (quoting Department of Banking, State of Nebraska, v. Pink, 317 U.S. 264, 267 (1942), reh'g. denied, 318 U.S. 802 (1943)). The finality requirement "is not one of those technicalities to be easily scorned [because] [i]t is an important factor in the smooth working of our federal system." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945). The policies underlying the finality requirement are: (1) avoiding piecemeal review of state court decisions; (2) avoiding the rendering of advisory opinions in cases where there may be no

Article III case or controversy; and (3) minimizing federal intrusion into state affairs. North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

A full determination of Mr. Parker's rights did not occur because the Missouri Supreme Court left undecided the two other points of error raised until the trial court certifies to it a record of the Batson remand. What remains to be decided are the substantive merits of two points of error and not simply some ministerial act. Granting certiorari would result in piecemeal review of Mr. Parker's conviction because the Missouri Supreme Court still has before it two Points of error alleging violations under the State and Federal Constitutions. Allowing review could produce an advisory opinion since the Missouri Supreme Court could choose to resolve Mr. Parker's conviction based on one of the two remaining points. Finally, federalism concerns of minimizing intrusion into state court proceedings would be severely undermined because of the presence of the undecided claims.

Besides the absence of a final judgment on the two remaining non-Batson claims, the Missouri Supreme Court's treatment of the Batson claim does not even constitute a final determination of that issue. There has not been a full determination of Mr. Parker's rights under Batson. By ordering a remand substantially more than a ministerial act of entering judgment remains to be done.

The decision in Montgomery Bldg. & Construction Trades

Council v. Ledbetter Erection Co., Inc., 344 U.S. 178 (1952),[1] is instructive in the present matter. There, an Alabama Circuit Court granted a temporary injunction against labor picketing and the Alabama Supreme Court affirmed the granting of the temporary injunction. Id. 344 U.S. at 179. The certiorari petition was dismissed because the injunction involved was a temporary injunction, and not a permanent injunction, which constituted only an interlocutory judgment. Id. 344 U.S. at 180-81.

The decision of the Missouri Supreme Court is interlocutory in two respects. First, the absence of any ruling on the two other claims of error means the decision is interlocutory. Second, the absence of a ruling on the substantive merits of the Batson claim, and the ordering of a remand for a hearing, means the Missouri Supreme Court's decision is interlocutory.

This Court has found a final judgment can exist in four narrow categories even when future state proceedings are contemplated. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975). Those categories are as follows: (1) the federal issue is conclusive or the outcome of further proceedings is

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[1] The decision in Montgomery Bldg. & Construction Trades Council was later overruled on limited grounds not applicable here in Local No. 438 Construction & General Laborers' Union AFL-CIO v. Curry, 371 U.S. 542 (1963). There, unlike Montgomery Bldg. & Construction Trades Council, this Court concluded it had jurisdiction to decide whether state courts or the National Labor Relations Board had exclusive jurisdiction to issue a temporary injunction in a labor dispute. Id. 371 U.S. at 552. The Court's opinion indicated that it was adhering to the long-standing rule that interlocutory injunctions do not constitute final judgments. Id. Additionally, Justice Harlan's concurrence focused on the fact that in Curry all that remained to be done to render the judgment final was a formality whereas in Montgomery Bldg. & Construction Trades Council that was not the situation. Id. 371 U.S. at 553-54 (Harlan, J., concurring).

preordained; (2) the federal issue will survive and require decision regardless of the outcome of the subsequent state proceedings; (3) later review is not possible because the federal issue will be rendered moot no matter the outcome of the further proceedings; and (4) the failure to grant review will seriously erode federal policy. Id. 420 U.S. at 477-85.

None of the categories identified in Cox Broadcasting are applicable here. The Batson issue is not conclusive because the other two claims of error remain for the Missouri Supreme Court to decide and there is nothing to suggest that resolution of any question is preordained. The Missouri Supreme Court could always choose to decide Mr. Parker's case on the two Points which still must be addressed. In such a case, any perceived federal issue would not survive, and therefore, would not require decision regardless of the outcome of the state proceedings. Further, any federal issue, presented under Batson, will not be clearly rendered moot because the record on the hearing of the substantive merits of that claim must be certified to the Missouri Supreme Court (Pet. A 20). Rather than eroding a substantial federal policy, the Missouri Supreme Court's directive, always requiring explanations for removing members of racially cognizable groups, advances this Court's goal and policy of eradicating racial discrimination from the courtroom. See, e.g., Edmonson v. Leesville Concrete Co. Inc., __ U.S. __, 111 S.Ct. 2077, 2088 (1991), and infra Argument II at 12-13.

Besides lacking jurisdiction under 28 U.S.C. Section 1257(a), certiorari should be denied because of the abstention

doctrine recognized in Younger v. Harris, 401 U.S. 37 (1971). In Younger, this Court reversed the decision of a Federal District Court which enjoined a state prosecution. Id. 401 U.S. at 39-40. Enjoining state prosecutions was held to be proper only when great and immediate irreparable injury will result. Id. 401 U.S. at 46. This Court's Younger decision, like the final judgment requirement, was premised on federalism concerns. Id. 401 U.S. at 44-45. What petitioner is asking this Court to do is to enjoin the orderly consideration of a Batson hearing in a criminal prosecution in violation of the abstention doctrine recognized as so critical to Our Federalism in Younger. No great and immediate irreparable injury will inure to petitioner in allowing the Batson remand to go forward and, therefore, the certiorari petition should be denied.

Certiorari should be denied because a final judgment was not entered and, therefore, jurisdiction does not exist. Additionally, certiorari should be denied because doing so would conflict with the Younger v. Harris abstention doctrine.

II.

WHETHER CERTIORARI SHOULD BE DENIED BECAUSE REQUIRING PETITIONER TO ALWAYS SUPPLY REASONS MERELY IMPLEMENTS BATSON, A MATTER COMMITTED TO THE LABORATORY OF THE STATES, AND THEREBY ADVANCES THIS COURT'S PURPOSE OF ERADICATING RACIAL DISCRIMINATION IN THE COURTROOM.

In Mr. Parker's case, and State v. Antwine, 743 S.W.2d 51 (Mo. banc 1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988), the Missouri Supreme Court held that petitioner is required to give explanations for its peremptory challenges whenever a Batson claim is asserted without a defendant first being required to demonstrate a prima facie case (Pet. A 12-20). These decisions have implemented Batson and are consistent with this Court's decisions that have indicated the implementation of Batson is committed to the laboratory of the States (Pet. A 14). Additionally, requiring explanations, whenever a Batson challenge is asserted, advances this Court's laudable purpose of eradicating the spectre of racial discrimination in the courtroom.

This Court observed in Batson that "[i]n light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." Batson v. Kentucky, 476 U.S. at 99 n.4. Accord Powers v. Ohio, ___ U.S. ___, 111 S.Ct. 1364, 1374 (1991) (leaving to

trial courts to develop rules to ferret out peremptory challenges that are a mask for racial prejudice); Edmonson v. Leesville Concrete Co. Inc., ___ U.S. ___, 111 S.Ct. 2077, 2089 (1991) (trial courts are left to develop evidentiary rules to implement Batson). The idea that implementing Batson is a matter for the states was underscored by this Court in Ford v. Georgia, __ U.S. __, 111 S.Ct. 850 (1991). In Ford, this Court indicated that the timeliness of a Batson challenge is appropriately governed by local rules of law. Id. at 857. Requiring petitioner to state its reasons for its peremptory challenges, whenever a Batson claim is raised, is consistent with the principles of Our Federalism that implementing Batson is a matter to be decided by the States.

In Cruzan v. Director, Missouri Department Of Health, ___ U.S. ___, 110 S.Ct. 2841, 2852-55 (1990), this Court held that Missouri's requirement that before treatment of an incompetent person can be withdrawn the person's desire to terminate the medical treatment must be established by clear and convincing evidence does not violate a person's due process liberty interest in refusing life-sustaining treatment. Writing separately, Justice O'Connor observed that in Cruzan the Court only decided that one State's procedure did not violate the Constitution and "the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States . . . . " Id. at 2859

(relying on New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Similarly, by indicating that implementing Batson is a matter for State courts, this Court has endorsed the view that the States are to act as a "laboratory" in how they seek to effectuate the goal of eliminating racial discrimination from jury selection.

The Missouri Supreme Court has embraced the role of the States acting as a "laboratory" in implementing Batson by requiring petitioner to state its reasons for its peremptory challenges whenever a Batson claim is asserted. The Batson decision was prompted by the fact that "[b]y compromising the representative quality of the jury, discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'" Batson, 476 U.S. at 86 n.8 (quoting Akins v. Texas, 325 U.S. 398, 408, reh'g. denied 326 U.S. 806 (1945)(Murphy, J., dissenting)). Cf. United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) (suggesting this Court engages in a more searching inquiry to protect "discrete and insular minorities" because the political processes tend to fail to protect these individuals). The concern for protecting the rights of defendants from racial discrimination was extended to protecting eligible venirepersons from racial discrimination. Powers v. Ohio, __ U.S. at __, 111 S.Ct. at 1368. The laudable goal of protecting both defendants and

venirepersons from racial discrimination is advanced because, as the Missouri Supreme Court noted in its opinion here, requiring explanations when a challenge is made avoids creating the opportunity for post-hoc rationalizations or fabrications when petitioner is required to contemporaneously explain its challenges (Pet. A 15, 19). The procedure adopted by the Missouri Supreme Court therefore advances the policies underlying Batson and its progeny.

Besides advancing the policies of Batson, the Missouri Supreme Court identified a legitimate state interest in conserving judicial resources (Pet. A 15, 19). The Missouri Supreme Court's directive avoids the undesirable consumption of judicial resources that results when a remand is ordered because the trial court found a prima facie case was not demonstrated, but the appellate court concludes that burden was satisfied (Pet. A 15, 19). Mandating petitioner state its reasons for its challenges avoids the problem of attempting to reassemble all the participants at a time when the events of voir dire are no longer fresh in their minds (Pet. A 15).

Petitioner requests this Court grant certiorari because the Missouri Supreme Court has "misinterpreted and misapplied" Batson and its progeny (Pet. 13). Rule 10.1 sets forth considerations for when certiorari is

appropriate. The only consideration[2] petitioner can properly seek to invoke is that a state court has decided an important question of federal law which has not been, but should be decided, by this Court or has decided a federal question in a way that conflicts with decisions of this Court. See Rule 10.1(c). This Court has previously decided that implementing Batson is committed to the States, and, therefore there is no question which should be decided and no conflict with the decisions of this Court.

Petitioner also asserts certiorari should be granted because the Missouri Supreme Court's directive "constitutes an unwarranted and therefore impermissible interference with the [petitioner's] exercise of its peremptory strikes." (Pet. 14). This Court has indicated that jurisdiction to review a final judgment of a state court "cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." Oxley Stave Co. v. Butler County, 166 U.S. 648, 655 (1897) (emphasis added). Simply because the Missouri Supreme Court's directive interferes with petitioner's peremptory challenges, in a manner that makes it more difficult to engage in racial discrimination, does

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[2] Rule 10.1(a) is inapplicable because it only applies to decisions of the United States Courts of Appeals. Because the Missouri Supreme Court did not decide this case in a manner that conflicts with the decision of another state court of last resort or a United States Court of Appeals Rule 10.1(b) does not apply.

not constitute the assertion of a Federal right. Petitioner's real complaint with the Missouri Supreme Court's directive is that it no longer allows prosecutors, who engage in racially discriminatory challenges, to use the prima facie case as a procedural shield and a sword for evading the commands of Batson.[3]

Certiorari should be denied because the Missouri Supreme Court's directive merely implements Batson, a matter which this Court has committed to the laboratory of the States, and furthers this Court's desire to render racial discrimination in the courtroom an unsavory relic of the past. Additionally, petitioner has failed to present questions which this Court has indicated, in its rules and decisions, warrant and allow granting certiorari.

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[3] In holding that a Batson claim is timely raised if it is presented before the venire is excused and the jury is sworn, the Missouri Supreme Court rejected petitioner's argument that a defendant should be required to raise a Batson claim prior to exercising his peremptory challenges (Pet. A 9-12). While rejecting petitioner's contention, the Missouri Supreme Court characterized its position as "suspect" (Pet. A 10). This Court should similarly view petitioner's complaints about the Missouri Supreme Court's directive as "suspect" and motivated by a desire to facilitate prosecutors in evading Batson's laudable goal of ending racial discrimination in the courtroom.

CONCLUSION

Respondent respectfully prays this Court deny the petition for certiorari and that the non-final decision of the Missouri Supreme Court be allowed to stand as written by that Court.

Respectfully submitted,

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	)	
Petitioner,	)	
	)	
vs.	)	No. 92-702
	)	
VORNELL PARKER,	)	
	)	
Respondent.	)	

CERTIFICATE OF FILING BY MAIL OF BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Having been duly sworn, Melinda K. Pendergraph, attorney for the Respondent, certifies to this Court that a Brief in Opposition to the United States Supreme Court for Writ of Certiorari in this case is due on November 19, 1992, and that she filed the Brief in Opposition and accompanying in forma pauperis motion and affidavit with the Court within the time allowed, by mailing them on November 4, 1992, by United States Mail, first class postage prepaid, addressed to Mr. William K. Suter, Clerk, Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543.

Respectfully submitted,

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Subscribed and sworn to before me, a Notary Public, on this 4th day of November, 1992.

Lea Ann Stoneking
Notary Public

My Commission expires:

LEA ANN STONEKING. NOTARY PUBLIC
BOONE COUNTY. STATE OF MISSOURI
MY COMMISSION EXPIRES 10/2/93